STATE OF RHODE ISLAND

WASHINGTON, SC. **SUPERIOR COURT**

(FILED: July 11, 2023)

HELEN RICCI,	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. WC-2020-0502**
	:	
RHODE ISLAND COMMERCE CORPORATION; RHODE ISLAND AIRPORT CORPORATION; RHODE ISLAND AIRPORT POLICE DEPARTMENT; DENNIS GRECO; and IFTIKHAR AHMAD,	:	
Defendants.	:	

DECISION

GIBNEY, P.J. Now before the Court is Plaintiff Helen Ricci's Motion to Reconsider this Court's June 1, 2023 advisement to Plaintiff that the Court would not appoint her counsel for the remaining duration of her ongoing Law Enforcement Officers' Bill of Rights (LEOBOR) proceedings. Jurisdiction is pursuant to G.L. 1956 § 9-30-2.[1]

[1] The Law Enforcement Officers' Bill of Rights (LEOBOR) "unequivocally anticipates the invocation of the jurisdiction of the Superior Court at several stages of the proceedings." *City of Pawtucket v. Laprade*, 94 A.3d 503, 515 (R.I. 2014). With that said, in those interlocutory circumstances, our Supreme Court has required "that a complaint be filed prior to the Superior Court exercising its jurisdiction in a LEOBOR proceeding [to] streamline the process, eliminate piecemeal appeals, and provide a clear record for appellate review." *Id.* Therefore, without objection by Defendants and considering that Plaintiff is currently proceeding *pro se*, the Court treats Plaintiff's Motion as a complaint seeking a determination and declaration of her right to an attorney pursuant to the LEOBOR statute. *See* G.L. 1956 § 9-30-2.

I

Facts and Travel

The underlying facts and travel of this matter are more fully explained in *Ricci v. Rhode Island Commerce Corp.*, 276 A.3d 903 (R.I. 2022) and No. WC-2020-0502, 2022 WL 17415459 (R.I. Super. Nov. 28, 2022). Since this Court's November 2022 Decision, denying Plaintiff's Motion to Dismiss Charges, Plaintiff and Defendants have initiated and engaged in LEOBOR hearings pursuant to G.L. 1956 § 42-28.6-4. (Pl.'s Mot. to Reconsider 4.) During the pendency of those hearings, on April 18, 2023, a justice of this Court granted Attorney Joseph Penza's Motion to Withdraw as Plaintiff's counsel and ordered that the LEOBOR proceedings be recessed for thirty days to permit Plaintiff to procure new counsel. (Order, Krause, J. (April 18, 2023).)

Subsequently, the LEOBOR hearing committee chairman advised this Court that Plaintiff had expressed concern over her inability to retain new counsel. (Pl.'s Mot. to Reconsider Attach. J.) The Court informally advised the committee chairman that Plaintiff would need to petition the Court to consider the appropriateness of court-appointed counsel. *Id.*; *see also City of Pawtucket v. Laprade*, 94 A.3d 503, 515 (R.I. 2014). On May 30, 2023, Plaintiff sent a letter to this Court stating that she had been "unable to secure counsel" and formally requested that the Court appoint her an attorney. (Pl.'s Mot. to Reconsider Attach. M.) On May 31, 2023, defense counsel responded via letter stating that Defendants could "find nothing in the LEOBOR that permits a police officer to have counsel appointed for her or him." *Id.* Attach. N. After consideration of the LEOBOR statute, this Court agreed with Defendants and responded to Plaintiff accordingly, explaining that while she had a right to be represented by an attorney, § 42-28.6-4(a) did not otherwise obligate the Court to provide her with counsel. *Id.* Attach. O. Now before the Court is Plaintiff's June 12, 2023 Motion to Reconsider that determination.

II

Standard of Review

A declaratory judgment proceeding "is neither an action at law nor a suit in equity but a novel statutory proceeding[.]" *Newport Amusement Co. v. Maher*, 92 R.I. 51, 53, 166 A.2d 216, 217 (1960)). The Superior Court has broad jurisdiction to "declare rights, status, and other legal relations whether or not further relief is or could be claimed." (Section 9-30-1.)

The right to counsel in a civil action is not a constitutional right, but instead "is a matter of legislative grace[.]" *Campbell v. State*, 56 A.3d 448, 454 (R.I. 2012). "[B]ecause LEOBOR is a creature of statute, the rules of statutory construction require us to give statutory provisions their customary and ordinary meaning in the absence of legislative intent to the contrary." *Laprade*, 94 A.3d at 514 (internal citations and quotations omitted). "Thus, if a statutory provision is unambiguous, there is no room for statutory construction and we must apply the statute as written." *Id.* (internal quotation omitted). Our Supreme Court has noted, however, that "[t]he [LEOBOR] statute is not a model of clarity." *Providence Lodge No. 3, Fraternal Order of Police v. Providence External Review Authority*, 951 A.2d 497, 505 (R.I. 2008). Therefore, where there is ambiguity, this Court's mandate "'is to determine and effectuate the Legislature's intent and to attribute to the enactment the meaning most consistent with its policies or obvious purposes.'" *Ricci*, 276 A.3d at 906 (quoting *Such v. State*, 950 A.2d 1150, 1155-56 (R.I. 2008)).

III

Analysis

Plaintiff's argument in favor of court-appointed counsel is two-fold: first, that the LEOBOR statute expressly recognizes a right to counsel in §§ 42-28.6-2(9) and 42-28.6-5(a); and

second, that constitutional due process demands her representation by counsel. (Pl.'s Mot. to Reconsider 7-11.) The Court rejects both contentions.

The Legislature's intent in enacting LEOBOR was to "require[ ] certain procedures to be followed in the processing of civilian complaints against police officers." *Providence Lodge No. 3, Fraternal Order of Police*, 951 A.2d at 505 (internal quotation omitted). To that end, the LEOBOR statute includes an express right to representation during interrogations and hearings. *See* § 42-28.6-2(9) ("At the request of any law enforcement officer under interrogation, he or she shall have the right to be represented by counsel of his or her choice who shall be present at all times during the interrogation."); § 42-28.6-5(a) (providing that the law enforcement officer "may be represented by counsel" at LEOBOR hearings). Codification of this right was deemed necessary considering the paucity of protections for at-will employees[2] and given the unsettled nature of the law of due process in the context of administrative proceedings.[3] The LEOBOR statute therefore

[2] *See Galloway v. Roger Williams University*, 777 A.2d 148, 150 (R.I. 2001) ("The law in Rhode Island is clear that employees . . . 'who are hired for an indefinite period with no contractual right to continued employment are [considered] at-will employees [who are] subject to discharge at any time for any permissible reason or for no reason at all.'") (quoting *DelSignore v. Providence Journal Co.*, 691 A.2d 1050, 1051 n.5 (R.I. 1997)); *see also Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985) (holding that the process due a terminated civil servant is notice and an opportunity to respond and that "[t]o require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee").

[3] "[D]ue process is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. . . . Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account." *Menechino v. Oswald*, 430 F.2d 403, 415 (2d Cir. 1970) (Feinberg, J. dissenting). Judge Feinberg's Second Circuit colleague, Judge Friendly, subsequently wrote the seminal article, *Some Kind of Hearing*, in which he too noted the "vague contours of the due process clause." Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1291 (1975). He advocated a view that the insertion of counsel into disciplinary proceedings "inevitably give[s] the proceedings a more adversary cast and tend[s] to reduce their utility[.]" *Id.*

made explicit that the process due an accused officer includes the right *to obtain and be represented* by counsel of the officer's choice. *See* §§ 42-28.6-2(9), 42-28.6-5(a). These statutory pronouncements, however, unambiguously do not extend to court *appointment* of counsel. *See Chandler v. Fretag*, 348 U.S. 3, 9 (1954) (explaining that the "distinction" between the right to obtain counsel and the right to be furnished with counsel "is well established in th[e] Court's decisions").

If the Legislature intended to provide officers with court-appointed counsel, the LEOBOR statute itself demonstrates that the General Assembly knew how to do so. Section 42-28.6-1(2)(i) provides that "[u]pon written application by a majority of the hearing committee, the presiding justice, in his or her discretion, may also appoint legal counsel to assist the hearing committee." (Section 42-28.6-1(2)(i).) "'[W]here [the Legislature] includes particular language in one section of a statute but omits it in another section of the same [a]ct, it is generally presumed that [the Legislature] acts intentionally and purposely in the disparate inclusion or exclusion.'" *In re Proposed Town of New Shoreham Project*, 25 A.3d 482, 525 (R.I. 2011) (quoting *Kucana v. Holder*, 558 U.S. 233, 249 (2010)).

That the LEOBOR statute does not require the Court to appoint an attorney for Plaintiff is further demonstrated by comparison to Rhode Island's postconviction-relief (PCR) statute. Like

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at 1288; *see also id.* at 1289 n.113 (noting the split of authority over whether students were entitled to counsel in disciplinary proceedings). Judge Friendly therefore advocated a retreat from the oft-quoted statement "that '[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.'" *Id.* at 1287 (quoting *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932)). It was against this backdrop of uncertainty that the General Assembly enacted the LEOBOR statute in 1976. *See* P.L. 1976, ch. 186, § 1. Commentators and scholars have also posited that states enacted LEOBORs in reaction to the civil rights movement of the 1960s and 1970s and growing calls to subject police action to external accountability mechanisms. *See, e.g.*, Kevin Keenan & Samuel Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills of Rights*, 14 B.U. PUB. INT. L.J. 185, 194-203 (2005).

a LEOBOR claim, a PCR application is also a noncriminal proceeding. *Campbell*, 56 A.3d at 454. Unlike the LEOBOR statute, however, the General Assembly expressly provided in the PCR statute that "[a]n applicant who is indigent shall be entitled to be represented by the public defender[,]" and "[i]f the public defender is excused from representing the applicant because of a conflict of interest or is otherwise unable to provide representation, the court shall assign counsel to represent the applicant." (G.L. 1956 § 10-9.1-5.) The General Assembly has included similar express statements in the Sexual Offender Registration and Community Notification Act, specifically "[t]hat the person has a right to be represented by counsel of their own choosing or by an attorney appointed by the court, if the court determines that he or she cannot afford counsel[.]" (G.L. 1956 § 11-37.1-13(3).) No such language was included in the LEOBOR statute.

Further, contrary to Plaintiff's oral argument that this Court has the inherent authority to appoint counsel unless otherwise prohibited by statute, the right to counsel in a civil action "is a matter of legislative grace" which must be conferred by more than legislative silence. *Campbell*, 56 A.3d at 454. "This Court . . . is not 'entitled to write into the statute certain provisions of policy which the [L]egislature might have provided but has seen fit to omit . . . . If a change in that respect is desirable, it is for the [L]egislature and not for the [C]ourt.'" *Simeone v. Charron*, 762 A.2d 442, 448 (R.I. 2000) (quoting *Elder v. Elder*, 84 R.I. 13, 22, 120 A.2d 815, 820 (1956)). The plain language of the LEOBOR statute therefore unambiguously provides that while Plaintiff has the right to be represented by an attorney of her choosing throughout an interrogation or hearing, the Court is not otherwise obligated to appoint her an attorney. *See* §§ 42-28.6-2(9), 42-28.6-5(a). Consequently, the Court declines to reconsider its denial of Plaintiff's request for a court-appointed attorney.

This denial—and Plaintiff's potential need to proceed *pro se* in her LEOBOR hearings—does not violate her right to due process because she has demonstrated neither indigency[4] nor that a LEOBOR hearing implicates a liberty interest akin to personal freedom. *See Lassiter v. Department of Social Services of Durham County*, 452 U.S. 18, 27 (1981) (explaining "the presumption that there is a right to appointed counsel only where the indigent, if [she] is unsuccessful, may lose [her] personal freedom"); *see also Kammerer v. Board of Fire & Police Commissioners of the Village of Lombard*, 256 N.E.2d 12, 14 (Ill. 1970) ("[T]he Board was under no constitutional obligation to appoint counsel for [the officer] in the disciplinary proceeding if he could not afford, or for other reasons could not or did not obtain, counsel for himself.").

Plaintiff's reliance on various cases assessing an ambiguity in the statutory scheme governing appeals from sex offender risk level classification is misplaced, as those cases are factually (i.e., the liberty interest implicated) and legally (i.e., the statute at issue) inapposite. *See* Pl.'s Mot. to Reconsider 8, 11-12 (citing *State v. Leon*, No. PM 12-1859, 2013 WL 1089005 (R.I. Super. Mar. 12, 2013); *State v. Germane*, 971 A.2d 555, 575 (R.I. 2009); *DiCarlo v. State*, No. PM-13-5062, 2014 WL 11264685, at *2 (R.I. Super. Mar. 4, 2014)). Finally, denial of Plaintiff's request for court-appointed counsel does not, as she contends, violate her Fifth Amendment privilege against self-incrimination because that privilege "may properly be invoked in a civil proceeding regardless of whether there is a pending criminal matter arising out of the same set of

[4] Plaintiff stated in the June 19, 2023 hearing on this matter that she is working two jobs and that she had access to financial support from family members. She also did not contest Defendants' claim that she had been reinstated by the Rhode Island Airport Police Department with full pay pending the outcome of her LEOBOR hearing. Plaintiff's alleged indigency is of no matter, however, because the Legislature has not seen fit to allow for use of public funds to appoint counsel in LEOBOR proceedings.

factual circumstances" and is not otherwise dependent on the presence or absence of counsel. *Tona, Inc. v. Evans*, 590 A.2d 873, 875 (R.I. 1991).[5]

IV

Conclusion

For the reasons set forth herein, this Court denies Plaintiff's Motion to Reconsider and declares that the LEOBOR statute does not create for law enforcement officers a statutory right to court-appointed counsel in LEOBOR proceedings. Counsel shall prepare the appropriate orders for entry.

[5] The Court need not address Plaintiff's claims that denial of court-appointed counsel violates her right to equal protection, which are stated in a conclusory manner and without further argument, citation, or support. *See, e.g.*, Pl.'s Mot. to Reconsider 7, 11, 17. "When there is no meaningful development of issues and, importantly, no citation to the record or legal authority, this Court will not 'give life' to arguments that are not properly developed." *Terzian v. Lombardi*, 180 A.3d 555, 558 (R.I. 2018).

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Ricci v. Rhode Island Commerce Corporation, et al.**
CASE NO:	**WC-2020-0502**
COURT:	**Washington County Superior Court**
DATE DECISION FILED:	**July 11, 2023**
JUSTICE/MAGISTRATE:	**Gibney, P.J.**
ATTORNEYS:	
For Plaintiff:	**Helen Ricci, *pro se***
For Defendant:	**Christopher N. Dawson, Esq.** **Timothy K. Baldwin, Esq.** **Timothy C. Cavazza, Esq.** **Joseph D. Whelan, Esq.**